A

Adil Juta Sdn Bhd v Tenaga Nasional Bhd

B HIGH COURT (SHAH ALAM) — CIVIL SUIT NO 22 NCVC-209–04 OF 2014
AZIMAH OMAR JC
18 AUGUST 2014

C *Public Utilities — Electricity — Meter tampering — Discovery of meter tampering but correction action cannot be made because there was no one at premises — Defendant returned to premises next day but was denied entry and told to come back in four days — Defendant returned four days later but discovered that meter had been normalised — Notification of disconnection of electricity*
D *— Ex parte application by plaintiff to reinstate electricity — Whether application by plaintiff fell within matters of urgency and ought to be heard ex parte — Electricity Supply Act 1990 s 38*

The plaintiff was involved in the prawn rearing business. On their routine
E check on the plaintiff's premises, the defendant conducted a meter inspection and found that there were evidences to proof that the meter had been tampered with. Since none of the plaintiff's employee was present at that particular time, the team decided to return to the premises later in the morning to carry out corrective measures. When the defendant arrived, they were refused entry by
F the plaintiff's workers and were asked to come back four days later. As scheduled, the defendant returned to the same premises four days later but discovered that plaintiff had rectified the tampering of the CT and normalised the meter reading. Two months later, the defendant had issued Form A of the Electricity Supply Act 1990 notifying the plaintiff that evidence of tampering
G were found during the inspections at the plaintiff's premises, and consequent to that the supply of electricity to the plaintiff's premises will be disconnected. The electricity was eventually disconnected. By way of an ex parte application, the plaintiff was granted an ad interim injunction order compelling the defendant to reinstate the supply of electricity to the plaintiff's premises
H pending the disposal of the inter parte hearing of the injunction application. According to the plaintiff, upon receiving the notice, the plaintiff's representative went to see the defendant's officer and objected to the disconnection of the supply of electricity. The representative had also informed the defendant's officer that if the supply of electricity is disconnected, it will
I affect the oxygen level in the ponds and the prawns will die. The plaintiff averred that there was no reason for disconnection as there was no urgent situation which had arisen to warrant the defendant to act under s 38 of the Electricity Supply Act 1990 ('the Act'). The defendant argued that the ex parte order obtained by the plaintiff was wrong, a nullity and should be set aside on

the grounds that the affidavit in support of the plaintiff's ex parte application for an injunction did not comply with the mandatory requirements under O 29 r 1(2A) of the Rules of Court 2012, in particular paras (c) and (d). The question to be determined was whether the application by the plaintiff fell within matters of urgency and ought to be heard ex parte without the other party being notified to defend its action in disconnecting the supply of electricity to the plaintiff's premises.

Held, dismissing the application with costs of RM5,000:

(1) The position taken by the plaintiff when obtaining the ex parte order was very much contrary to the actual facts prior to the disconnection of the supply of electricity which were later unravelled from the three affidavits in opposition filed by the defendant in opposing the plaintiff's application for an injunction. The plaintiff had full knowledge of the entire event. The plaintiff was in fact aware of the inspection exercise conducted on its premises, had refused the defendant entry to carry out the correction work and during the lapse of four days whereby the defendant was refused entry, the plaintiff had done something on the CT and had normalised the meter. The evidence of normalisation was discovered by the defendant's employees when they returned for correction work. There were no urgency, abruptness and secrecy for the ex parte injunction to be granted to the plaintiff (see paras 31 & 33–34).

(2) There was a repetitive occurrence of tampering in the plaintiff's premises, though unfavourable to the plaintiff, was a relevant and material fact, therefore it should be disclosed by the plaintiff when applying for the ex parte order. If this fact was disclosed to the judge at the hearing of the ex parte application, it would have been a different consideration and the ex parte injunction would have been refused. The plaintiff's conduct of repetitive tampering indicates an act of disrespectful and blatant disregard of the law. The court of equity must and should not lend its hand to those who seeks equity with unclean hands (see paras 43–44).

(3) The defendant's act in disconnecting the supply of electricity to the plaintiff's premises cannot be said to be an act of mala fide and neither was it an abuse of the process of law. The defendant's act was a legitimate act within the parameters of s 38 of the Act. Hence, the plaintiff's case was not exceptional or extremely rare in nature. There were also no special circumstances for the court to exercise its discretionary powers to grant an interlocutory mandatory injunction to the plaintiff (see para 71).

(4) The balance of convenience in this present case laid in favour of the defendant. Section 38 of the Act was enacted by the Parliament specifically to assist the defendant to operate in an effective and efficient manner to prevent abuse of electricity. To accede to the plaintiff's request

for an interlocutory mandatory injunctive relief when the defendant had acted within the parameters of its power, will not only result in the hindering the efficacy of the defendant's administration and operation in curbing or preventing the abuse of electricity such as stealing, it would also defeat the intention of the Parliament in enacting such provision, in which the court was not prepared to do. To do so would create a grave and substantial injustice to the defendant and the damage suffered would be irreparable (see para 75).

[Bahasa Malaysia summary

Plaintif terlibat dalam perniagaan menternak udang. Semasa pemeriksaan rutin mereka di premis plaintif, defendan telah melakukan pemeriksaan meter dan mendapati bahawa terdapat bukti yang menunjukkan bahawa meter itu telah diusik. Oleh kerana tiada seorang daripada pekerja plaintif yang hadir pada masa tersebut, kumpulan tersebut membuat keputusan untuk datang semula ke premis itu kemudian pada pagi tersebut untuk menjalankan langkah-langkah pembetulan. Apabila defendan tiba, mereka tidak dibenarkan masuk oleh pekerja plaintif dan diminta datang empat hari kemudian. Seperti dijadualkan, defendan kembali ke premis sama empat hari kemudian tetapi mendapati plaintif telah membetulkan pengubahan CT itu dan menormalkan bacaan meter. Dua bulan kemudian, defendan telah mengeluarkan Borang A Akta Bekalan Elektrik 1990 dengan memberitahu plaintif bahawa bukti pengubahan ditemui semasa pemeriksaan di premis plaintif, dan berikutan itu bekalan elektrik ke premis plaintif akan dipotong. Bekalan elektrik telah dipotong akhirnya. Melalui permohonan ex parte, plaintif telah diberikan perintah injunksi sementara memaksa defendan mengembalikan bekalan elektrik ke premis plaintif sementara menunggu selesai perbicaraan inter parte untuk permohonan injunksi itu. Menurut plaintif, selepas menerima notis itu, wakil plaintif telah berjumpa dengan pegawai defendan dan membantah pemotongan bekalan elektrik itu. Wakil itu juga telah memberitahu pegawai defendan bahawa jika bekalan elektrik itu dipotong, ia akan menjejaskan tahap oksigen dalam tasik dan menyebabkan udang mati. Plaintif menegaskan bahawa tiada sebab untuk pemotongan itu kerana tiada keadaan mendesak yang timbul untuk mewajarkan defendan bertindak di bawah s 38 Akta Bekalan Elektrik 1990 ('Akta tersebut'). Defendan berhujah bahawa perintah ex parte yang diperoleh oleh plaintif adalah salah, terbatal dan patut diketepikan atas alasan bahawa afidavit sokongan kepada permohonan ex parte plaintif untuk injunksi tidak mematuhi keperluan mandatori di bawah A 29 k 1(2A) Kaedah-Kaedah Mahkamah 2012, khususnya perenggan-perenggan (c) dan (d). Persoalan untuk ditentukan adalah sama ada permohonan oleh plaintif terangkum dalam perkara yang mendesak dan patut didengar secara ex parte tanpa pihak lain diberi notis untuk membela tindakannya dalam memotong bekalan elektrik ke premis paintif.

Diputuskan, menolak permohonan dengan kos RM5,000:

(1) Kedudukan yang diambil oleh plaintif dalam memperoleh perintah ex parte adalah bertentangan dengan fakta sebenar sebelum pemotongan bekalan elektrik yang telah didedahkan melalui tiga afidavit bantahan yang difailkan oleh defendan dalam membantah permohonan plaintif untuk injunksi. Plaintif mempunyai pengetahun penuh tentang keseluruhan kejadian. Bahkan plaintif sedar tentang amalan pemeriksaan yang dilakukan ke atas premisnya, telah menghalang defendan daripada memasuki premis untuk melaksanakan kerja pembetulan dan sepanjang empat hari yang mana defendan tidak diberi masuk, plaintif telah melakukan sesuatu kepada CT itu dan telah menormalkan meter itu. Bukti penormalan itu ditemui oleh pekerja defendan apabila mereka kembali ke premis itu untuk kerja pembetulan. Walau bagaimanapun, tiada kesegeraan, tindakan mendadak dan kerahsian untuk injunksi ex parte diberikan kepada plaintif (lihat perenggan 31 & 33–34).

(2) Wujud kejadian pengubahan yang berulang di premis plaintif, meskipun tidak menyebelahi plaintif, adalah fakta penting dan relevan, oleh itu ia patut didedahkan oleh plaintif apabila memohon untuk permohonan ex parte. Jika fakta ini didedahkan kepada hakim semasa perbicaraan permohonan ex parte, mungkin pertimbangan berbeza dan injunksi ex parte mungkin ditolak. Tindakan plaintif yang berulang kali mengubah itu menunjukkan tindakan tidak hormat dan jelas mengabaikan undang-undang. Mahkamah ekuiti tidak perlu dan tidak wajar membantu sesiapa yang memohon ekuiti dengan tindakan kotor (lihat perenggan 43–44).

(3) Tindakan defendan memotong bekalan elektrik ke premis plaintif tidak boleh dikatakan sebagai tindakan berniat buruk dan ia bukan satu penyalahgunaan proses undang-undang. Tindakan defendan adalah tindakan yang sah dalam parameter s 38 Akta tersebut. Justeru, kes plaintif tidak bersifat luar biasa atau jarang berlaku. Juga, tiada keadaan istimewa untuk mahkamah melaksanakan kuasa budi bicaranya untuk memberikan injunksi mandatori interlokutori kepada plaintif (lihat perenggan 71).

(4) Imbangan kesekuaian dalam kes ini menyebelahi defendan. Seksyen 38 Akta tersebut telah digubal oleh Parlimen khususnya untuk membantu defendan berfungsi secara berkesan dan cekap bagi mengelakkan penyalahgunaan elektrik. Untuk membenarkan permohonan plaintif bagi relief injunksi mandatori interlokutori di mana defendan telah bertindak dalam parameter kuasa, bukan sahaja akan menyebabkan menghalang keberkesanan pentadbiran dan operasi defendan dalam membendung atau menghalang penyalahgunaan elektrik seperti mencuri, ia juga akan menggagalkan niat Parlimen dalam penggubalan peruntukan itu, di mana mahkamah tidak bersedia untuk melakukannya. Untuk berbuat demikian akan mewujudkan

ketidakadilan serius dan ketara kepada defendan dan kerosakan yang dialami tidak boleh diperbaiki (lihat perenggan 75).]]

Notes

For cases on electricity in general, see 10 *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2237–2249.

Cases referred to

American Cyanamid Co v Ethicon Ltd [1975] 1 All ER 504, HL (refd)
Bakmawar Sdn Bhd v Malayan Banking Bhd [1992] 1 MLJ 67, HC (refd)
Claybricks & Tiles Sdn Bhd lwn Tenaga Nasional Bhd [2007] 1 MLJ 217, CA (refd)
Gibb & Co v Malaysia Building Society Bhd [1982] 1 MLJ 271, FC (refd)
Jakob Renner (an infant suing through his father and next friend, Gilbert Renner) & Ors v Scott King, Chairman of Board of Directors of the International School of Kuala Lumpur & Ors [2000] 5 MLJ 254, HC (refd)
Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193, CA (refd)
Kepong Industrial Park Sdn Bhd & Ors v Teoh Seng Aun & Ors [1999] 6 MLJ 342, HC (refd)
Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd [2004] 1 MLJ 257, FC (refd)
Lim Sung Huak & Ors v Sykt Pemaju Tanah Tikam Batu Sdn Bhd [1993] 3 MLJ 527, HC (refd)
MRK Nayar v Ponnusamy & Ors [1982] 2 MLJ 174, FC (refd)
Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong [1996] 3 MLJ 85, CA (refd)
Professor Dr A Kahar Bador & Ors v N Krishnan & Ors [1983] 1 MLJ 407 (refd)
R v Kensington Income Tax General Comrs, ex p Princess de Polignac [1917] 1 KB 486, CA (refd)
Redland Bricks Ltd v Morris [1970] AC 652, HL (refd)
Shamsudin bin Shaik Jamaludin v Kenwood Electronics Technologies (M) Sdn Bhd [1999] 3 MLJ 438, HC (refd)
Shepherd Homes Ltd v Sandham [1971] Ch 340, Ch D (refd)
Sivaperuman v Heah Seok Yeong Realty Sdn Bhd [1979] 1 MLJ 150, FC (refd)
Tan Yeong Kim v Tenaga Nasional Berhad [2000] MLJU 447; [2000] 8 CLJ 629, HC (refd)
Tinta Press Sdn Bhd v Bank Islam Malaysia Bhd [1987] 2 MLJ 192, SC (refd)
University of Malaya Medical Centre v Choo Chee Kon & Anor [2008] 3 MLJ 278, HC (refd)
WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd [2012] 4 MLJ 296; [2012] 4 CLJ 478, FC (refd)
Wah Loong (Jelapang) Tin Mine Sdn Bhd v Chia Ngen Yiok [1975] 2 MLJ 109 (refd)
Westminster Brymbo Coal and Coke Co v Clayton (1867) 36 LJ Ch 476 (refd)

Legislation referred to

Electricity Supply Act 1990 ss 38, 37(1), (3), (14), Form A
Rules of Court 2012 O 29 r 1(2A), (2A)(c), (2A)(d)

C M Lai (Bahari, Choy & Nongchik) for the plaintiff.
Raja Ahmad Mohzanuddin Shah (Faizah Kamarudin with him) (Azmi & Assoc) for the defendant.

Azimah Omar JC:

[1] The plaintiff's application for an interim injunction against the defendant is with regards to the power conferred by the Parliament to Tenaga Nasional Bhd ('TNB') under s 38 of the Electricity Supply Act 1990 ('the Act') empowering TNB to disconnect the supply of energy to any premises, if it is found by its employees that an offence has been committed under ss 37(1), 37(3), or 37(14) of the Act.

FACTUAL BACKGROUND

[2] The plaintiff ('Adil Juta Sdn Bhd') is involved in the prawn rearing business and its prawn ponds are located at Jalan Bagan, Sg Apong, Teluk Am, Sabak Bernam.

[3] The defendant is Tenaga Nasional Bhd (TNB), the sole provider of the supply of electricity in the country.

[4] On their routine check on the plaintiff's premises, the defendant's employees, headed by Mohd Isyamilly bin Ideris had gone to the plaintiff's ponds at 3.10am on 19 February 2014 to conduct a meter inspection.

[5] As a result of the inspection, the defendant's team found that there were evidences to proof that the meter had been tampered with. The particulars of that finding, among others, were as follows:

(a) the current reading on the meter's display was lower than the current reading at TNB's incoming for the three phases;

(b) there were traces of glue on the body of the current transformer ('CT') for the three phases;

(c) there were lever marks on part of CT's body for the three phases;

(d) seals on the CT's terminal on the three phases were tampered with and

(e) the stickers/safety stickers on the CT were torn as well.

[6] Upon these findings, corrective action by the team and termination of the supply of electricity were necessary. Since none of the plaintiff's employee was present at that particular time, the team decided to return to the premises later in the morning.

[7] When the team arrived at 7am on the same day, they were refused entry by the plaintiff's workers and were asked to come back four days later on 23 February 2014 to carry out the corrective action.

[8] As scheduled, the team returned to the same premises on 23 February 2014 and proceeded to carry out the corrective action. However upon further examination, they found:

(a) there were traces of lever marks and glue on the body of the CT for the three phases;

(b) the CT for the three phases had been adjusted to a higher value of current transformer ratio when compare to the reading during the inspection on 19 February 2014;

(c) consumer (the plaintiff) had normalised the tampering of the CT;

(d) the safety stickers of the CT were torn on the three phases; and

(e) seals on the CT's terminal were counterfeited on the three phases.

[9] It was during this corrective process that the defendant's employees had discovered that the plaintiff had rectified the tampering of the CT and normalised the meter reading.

[10] Two months later, on 22 April 2014, the defendant had issued Form A of the Act notifying the plaintiff that evidence of tampering were found during the inspections at the plaintiff's premises, and consequent to that the supply of electricity to the plaintiff's premises will be disconnected on 23 April 2014.

[11] The electricity was eventually disconnected on 23 April 2014.

[12] On 24 April 2014, by way of an ex parte application, the plaintiff was granted an ad interim injunction order compelling the defendant to reinstate the supply of electricity to the plaintiff's premises pending the disposal of the inter parte hearing of the injunction application.

THE INTER PARTE HEARING

[13] The plaintiff's application was supported by an affidavit deposed by one, Ding Tuo Tee, the plaintiff's director.

[14] In his affidavit, he averred that on 22 April 2014, he had unexpectedly received a Form A notification from the defendant. In the said notice, the plaintiff was notified that the defendant had found evidence that the meter in the plaintiff's premises had been tampered with and thus giving notice that the supply of electricity to the plaintiff's premises will be discontinued on 23 April 2014.

[15] Upon receiving the notice, the plaintiff's representative went to see the defendant's officer and objected to the disconnection of the supply of electricity. The representative had also informed the defendant's officer that if the supply of electricity is disconnected, it will affect the oxygen level in the ponds and the prawns will die.

[16] The plaintiff's representative denied any act of tampering and requested to be furnished the grounds for the electricity disconnection.

[17] The plaintiff claimed that at the time of disconnection, the meter was in a good condition and had recorded the actual usage of electricity.

[18] The plaintiff alleged that the defendant's act in disconnecting the supply of electricity was done mala fide, as it was not done to prevent abusive usage of electricity but to penalise the plaintiff.

[19] The plaintiff averred that there was no reason for disconnection as there was no urgent situation which had arisen to warrant the defendant to act under s 38 of the Act.

[20] In the affidavit in support of the application, the plaintiff strongly denied having any access to the meter room and contended that the meter room was exclusively under the custody and control of the defendant in which it was locked with the defendant's padlock.

[21] Furthermore, the plaintiff could not have any access to the meter room as the surrounding area of the meter room was fenced with barbed wire and locked gate.

[22] The plaintiff's director, in his affidavit also claimed that the disconnection of electricity supply was unlawful and premature as the plaintiff was never served with any claims of outstanding amount.

[23] In opposing the plaintiff's application, the defendant filed three affidavits in reply namely:

(a) affidavit *jawapan defendan* 1 — affirmed by Chin Way Kong, the senior

engineer of the defendant. He is also the supervisor to the defendant's team who had conducted the inspection;

(b) affidavit *jawapan defendan* 2 — affirmed by Mohd Isyamilly bin Ideris — the head of the inspection team; and

(c) affidavit *jawapan defendan* 3 — affirmed by Ahmad Sharafi bin Ismail, a member of the inspection team.

[24] This court will deal with the facts deposed in all the three affidavits together with the defendant's argument in opposing the plaintiff's application.

[25] At the outset, it was submitted on behalf of the defendant that the ex parte order obtained by the plaintiff on 24 April 2014 was wrong, a nullity and should be set aside on the grounds that the affidavit in support of the plaintiff's ex parte application for an injunction did not comply with the mandatory requirements under O 29 r 1(2A) of the Rules of Court 2012 ('ROC'), in particular paras (c) and (d). In addition, there was also a non-disclosure of relevant and material facts on the part of the plaintiff when making the application.

[26] Basically, the defendant had disputed the plaintiff's application on the following grounds:

(a) the plaintiff had failed to comply with the mandatory requirements under O 29 r 1(2A) paras (c) and (d) of the ROC;

(b) the plaintiff had not disclosed relevant and material facts when obtaining the ex parte order; and

(c) the plaintiff had not satisfied the court on the legal conditions for an interlocutory injunction which is mandatory in nature.

Ground (a) — The plaintiff's failure in complying with the mandatory requirements under O 29 r 1(2A) para (c) and (d) of the ROC as the affidavit in support did not justify an ex parte application and did not contain clear and concise statement of any answer by the other party (or which he is likely to assert) to the claim or application

[27] It was submitted by the defendant's counsel that the plaintiff had not complied with the mandatory requirement under O 29 r 1(2A) para (c) of the ROC. It was argued that the urgency, abruptness or secrecy raised by the plaintiff in its affidavit in support of the ex parte application before the court was incomplete and was not based on full facts of the case and the actual legal position.

[28] Counsel for the defendant further contended, that the defendant should have been informed of the injunctive relief sought by the plaintiff and the defendant be given the opportunity to state the legal position in which the defendant had acted upon.

To this contention, the defence had brought to this court's attention the case of *University of Malaya Medical Centre v Choo Chee Kon & Anor* [2008] 3 MLJ 278 in which it was held by the High Court that, in setting aside the ex parte injunction order:

(1) There was merit in the defendant's contention that the plaintiff's failure to give notice was not justified. The plaintiff could have – and should have – notified the defendants on the 20 October itself of its intention to file the ex parte application on the next day, 21 October on a certificate of urgency so that the defendants could have alerted their solicitors; and so that the defendants' counsel could appear before the court at the hearing of the ex parte application and to apply to be given the opportunity to be heard on an ex parte opposed basis. But the plaintiff's doctors or solicitors chose not to inform the defendants of the ex parte application (see paras 20–21).

(2) There was no satisfactory explanation whatsoever proffered to the court as to why the defendants were not given notice on 20 October 2004 (or at the very least on the morning of 21 October). The explanation in the plaintiff's affidavit in support was too vague and too lames an excuse. There was clear non-compliance of O 29 r 1(2A)(c) of the RHC which was mandatory and constituted a very serious breach of the RHC and therefore, the ex parte order must be set aside, an approach consistent with the policy behind the introduction of r 1(2A) (see paras 23–27).

[29] Hence, in this connection the question to be determined is whether the application by the plaintiff falls within matters of urgency and ought to be heard ex parte without the other party being notified to defend its action in disconnecting the supply of electricity to the plaintiff's premises.

[30] In the affidavit in support of the ex parte application, the plaintiff had stated that the receipt of Form A from the defendant was very unexpected and the plaintiff was not told the reasons for the disconnection of the supply of electricity. The plaintiff had also painted a picture that they are an innocent party who had been victimised or penalised by the defendant. The plaintiff also alleged that the act by the defendant was mala fide and was an abuse of the process of law.

[31] It is the court's view that the position taken by the plaintiff when obtaining the ex parte order was very much contrary to the actual facts prior to the disconnection of the supply of electricity which were later unravelled from

the three affidavits in opposition filed by the defendant in opposing the plaintiff's application for an injunction.

[32] To this, excerpts of the relevant paragraphs from the defendant's affidavits shall be reproduced in particular paras 6, 11 and 12 of the affidavit *jawapan defendan* (2) below:

> para 6
>
> Pada 19 February 2014 lebih kurang jam 3.10 pagi, saya yang juga merupakan ketua pemeriksa kumpulan pada ketika itu bersama-sama dengan beberapa ahli pasukan pemeriksaan antaranya Encik Faidil bin Mustapakamal telah melakukan pemeriksaan ke atas pepasangan meter/meter di premis plaintif tersebut yang mempunyai nombor akaun 0144 00561484 10, yang mana tujuan pemeriksaan ini adalah juga bagi memastikan bahawa pepasangan meter/meter di premis plaintif tersebut berada dalam keadaan yang baik.
>
> para 11
>
> Susulan itu, saya telah sekali lagi pergi ke premis plaintif tersebut dengan diketuai oleh Encik Mohd Isyamilly bin Ideris bersama-sama beberapa ahli pasukan pemeriksaan pada hari yang sama lebih kurang jam 7.00 pagi bagi melakukan henti tugas untuk kerja-kerja tindakan pembetulan/pembaikan, walaubagaimanapun kakitangan plaintif yang ditemui telah tidak memberikan kebenaran untuk melakukannya pada masa tersebut dan memaklumkan kepada pihak kami agar datang semula pada hari Ahad, 23 February 2014 di antara jam 10.00 pagi hingga 5.00 petang untuk melakukan tugasan ini.
>
> para 12
>
> Selaras itu, pihak kami telah sekali lagi hadir ke premis plaintif tersebut pada 23 February 2014 lebih kurang jam 10.30 pagi untuk melakukan henti tugas bagi melakukan kerja-kerja tindakan pembetulan/pembaikan ke atas pepasangan meter/meter tersebut yang mana tugasan ini telah diketahui oleh Encik Mohd Isyamilly bin Ideris dan turut dihadiri oleh saya bersama-sama dengan beberapa ahli pasukan pemeriksaan yang lain iaitu Encik Norhaslam bin Nordin dan Encik Mohamad Faiz bin Md Raif.

[33] It is the court's view that the plaintiff had full knowledge of the entire event. The plaintiff was in fact aware of the inspection exercise conducted on its premises on the 19 February 2014, had refused the defendant entry to carry out the correction work and during the lapse of four days whereby the defendant was refused entry, the plaintiff had done something on the CT and had normalised the meter. The evidence of normalisation was discovered by the defendant's employees when they returned for correction work, in which these particular findings have been stated in para 5 earlier. The plaintiff had also been notified earlier on 23 February 2014 through the defendant's formal notices 'Pemakluman Semakan Pepasangan Meter Elektrik oleh TNB' (exh 'TNB10' — *affidavit jawapan defendan* (3)) and 'Surat Pemberitahuan Pengambilan

Barang-Barang Kes' (exh 'TNB11' — *affidavit jawapan defendan* (3)) which were received and signed by the plaintiff. TNB11 is the seizure form. The plaintiff had acknowledged in TNB11 that the counterfeited seals on the CT's terminals found by the defendant's employees at the plaintiff's premises were taken by the defendant. And thus, with this sequence of events Form A should not have come as a surprise to the plaintiff.

[34] Upon this evaluation, this court finds that there were no urgency, abruptness and secrecy for the ex parte injunction to be granted to the plaintiff.

[35] It was also averred by the defence that at the time the plaintiff applied for the ex parte injunction, the plaintiff is duty bound to inform the court in their affidavit in support of all the material facts relating to the application and also inform the court of any defences which the defendant are likely to have in opposing the application if it was heard inter parte by the court.

[36] It is the defence's argument that the plaintiff should have deposed in their affidavit that the defendant will defend its action by relying on the provision in s 38 of the Act.

[37] A perusal into the plaintiff's affidavit in support of the ex parte application clearly shows that the affidavit did not have any assertion to that effect. The words used in O 29 r 1(2A) is 'must' that connotes mandatory meaning, as stated by the Court of Appeal in the case of *Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong* [1996] 3 MLJ 85 at p 93:

> ... The word 'must' as opposed to 'may' is used in the rule, and we interpret that to mean as implying a peremptory mandate as opposed to a mere direction or discretion at the word 'may' implies. We equate the meaning of the word 'must' as that given to the word 'shall', and for that reason the choice of the word 'must' in the rule does not create the existence of any discretion or empowers the court to exercise such discretion.

[38] As such, the plaintiff had not complied with O 29 r 1(2A) of the ROC which requires mandatory compliance and adherence.

Ground (b) — Non-disclosure of relevant material fact when obtaining the ex parte order

[39] The counsel for the defendant further contended that the plaintiff had not come to court with clean hands as they had failed to disclose that prior to both of the 19 February 2014 and 23 February 2014 inspections, there was an earlier meter inspection exercise conducted at the plaintiff's premises in 2013 ie 28 November 2013 and the same finding was also discovered by the defendant; that the meter had been tampered with.

[40] In support of this contention, the counsel for the defendant had referred this court to the case of *Kepong Industrial Park Sdn Bhd & Ors v Teoh Seng Aun & Ors* [1999] 6 MLJ 342. It was held, inter alia:

> (2) Where a plaintiff now seeks interlocutory injunctive relief on an inter parties basis, the court may in exercising its jurisdiction, take into account how innocent or culpable the non-disclosures of the plaintiff were at the time of obtaining ex parte relief in deciding whether or not to grant the inter parties injunction. Such omissions must be deliberate (see pp 347I–348A, 348C).

[41] The fatal effect of non-disclosure of material and relevant facts when applying for an ex parte injunction has been decided in a voluminous number of cases. The Federal Court in the case of *MRK Nayar v Ponnusamy & Ors* [1982] 2 MLJ 174 held that when an interlocutory injunction is sought, the balance of inconvenience will be the overriding consideration but nonetheless, once the court is satisfied that there was suppression of material facts, the question of balance of convenience does not arise.

[42] It is trite law that an applicant in an ex parte application for an injunction is legally required to and must make full and frank disclosure of all material facts when making such application. In the case of *Professor Dr A Kahar Bador & Ors v N Krishnan & Ors* [1983] 1 MLJ 407, Hashim Yeop A Sani J (as he then was) had made the following observation on misrepresentation or suppression of material fact at p 409:

> An interlocutory injunction will not be dissolved unless the misrepresentation or suppression was of such a character as to mislead the court or if the true picture was presented the court would probably not have granted the injunction.

It has also been stated that all facts must be laid before the court and nothing should be suppressed (see (i) *Lim Sung Huak & Ors v Sykt Pemaju Tanah Tikam Batu Sdn Bhd* [1993] 3 MLJ 527 following *R v Kensington Income Tax General Comrs, ex p Princess de Polignac* [1917] 1 KB 486, (ii) *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257 and (iii) *Bakmawar Sdn Bhd v Malayan Banking Bhd* [1992] 1 MLJ 67).

[43] This court finds, the fact that there was a repetitive occurrence of tampering in the plaintiff's premises, though unfavourable to the plaintiff, is a relevant and material fact, therefore it should be disclosed by the plaintiff when applying for the ex parte order. I agree with the defence's contention that if this fact was disclosed to the judge at the hearing of the ex parte application, it would have been a different consideration and the ex parte injunction would have been refused.

[44] On this repetitive occurrence also, this court would also like to highlight here that the plaintiff's conduct of repetitive tampering indicates an act of disrespectful and blatant disregard of the law. The court of equity must and should not lend its hand to those who seeks equity with unclean hands.

Ground (c) — The plaintiff had failed to satisfy the court the pre-requisites for a mandatory interlocutory injunction

[45] In applying for the interlocutory injunction, learned counsel for the plaintiff submitted that the plaintiff had fulfilled the '3 stage test' enunciated in the classic case of *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193. During his submission learned counsel for plaintiff submitted the following:

(a) there are serious issue to be tried in this case;

(b) balance of convenience tilted in favour of the plaintiff; and

(c) damages would not be adequately compensated, if the injunction is not granted, plaintiff will suffer irreparable damage.

[46] On behalf of the plaintiff, the counsel for the plaintiff has submitted that the defendant's act in disconnecting the supply of electricity was done mala fide. On the bona fide serious issues to be tried, he had raised two issues namely, i) the plaintiff has no access to the meter and ii) the meter was in good condition and had recorded the actual usage at the time of disconnection.

[47] With regards to these issues, the plaintiff's counsel had referred this court to the decision of the Court of Appeal in the case of *Claybricks & Tiles Sdn Bhd lwn Tenaga Nasional Bhd* [2007] 1 MLJ 217. The counsel for the plaintiff submitted that the *Claybricks*'s case has laid down two conditions to be fulfilled by the defendant before s 38 can be invoked by the defendant. The first condition he said is that, there must be an arising or emergence of an urgent situation. Second, the act of disconnection is purposed to prevent the abuse of electricity such as stealing.

[48] It is submitted by the counsel for the plaintiff that in the present case, the defendant had failed to fulfil these two conditions. On the first condition, the plaintiff had argued that the defendant had waited for two months after the meter inspection before disconnecting the supply of electricity. Thus, there was no emergence of an urgent situation to warrant the disconnection. While on the second condition, the counsel further submitted that the defendant's act in disconnecting the supply of electricity in the present case is not for the purpose of preventing abusive usage of electricity such as stealing on the basis that the defendant had waited two months before disconnecting the supply. The counsel further contended that the defendant has yet to claim against the

plaintiff whatever outstanding amount if there is any in which the plaintiff claimed they had no outstanding due from the plaintiff to the defendant.

[49] In his reply, the counsel for defendant argued that the plaintiff is applying for a mandatory interlocutory injunction, hence the ordinary *American Cyanamid* guidelines governing applications for interlocutory injunctions or the *Keet Gerald*'s three stage test has no application in the present case.

[50] In this respect, he finds support of his contention by referring this court to the case of *Shamsudin bin Shaik Jamaludin v Kenwood Electronics Technologies (M) Sdn Bhd* [1999] 3 MLJ 438.

[51] In *Shamsudin*'s case, counsel for the defendant submitted that Abdul Malik bin Ishak J (as he then was) in his judgment has clearly expressed the correct statement of law in relating to the non-application of the principles propounded in the *American Cyanamid* case in cases of an application for an interlocutory mandatory injunction by stating:

> I have said earlier that the ordinary *American Cyanamid* guidelines governing application for interlocutory injunctions are not applicable to mandatory injunctions ...
>
> I cannot help but observe that in cases where the parties sought for an interlocutory mandatory injunctions, the principles enunciated in the *American Cyanamid* have not been followed and at the most it was referred to in passing only ...

[52] Counsel for the defendant submitted that in order for the plaintiff to succeed in an application for a mandatory interlocutory injunction, the plaintiff must satisfy this court that this case is an exceptional and extremely rare case. He also contended that special circumstances must also exist in this case.

[53] It is the defence's argument that this case rests entirely on the operation of s 38 of the Act which had been discussed, deliberated and decided by the Federal Court in the case of *WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd* [2012] 4 MLJ 296; [2012] 4 CLJ 478 and the Court of Appeal in the case of *Claybricks & Tiles Sdn Bhd lwn Tenaga Nasional Bhd* [2007] 1 MLJ 217.

[54] Counsel for defendant submitted that the operation of s 38 has been spelt out clearly by the Federal Court in the case of *WRP Asia Pacific*. He further submitted that the Federal Court has held that s 38 of the Act empowers the respondent to discontinue the supply of electricity based on the subjective finding of the employee of any offences found to have been committed under s 37(1), 37(3) or s 37(4). It was further held by the Federal

Court, the respondent had clearly complied with all the necessary statutory requirements of that particular section when the respondent has served the appellant not only with the letter but also two documents which were necessary pre-requisites under the Act.

[55] The counsel for the defendant also referred to two other cases relating to the proper interpretation of s 38 of the Act. First, the case of *Tan Yeong Kim v Tenaga Nasional Berhad* [2000] MLJU 447; [2000] 8 CLJ 629 and the same case which was referred by the plaintiff's counsel ie the *Claybricks*'s case.

[56] It was submitted further by the counsel for the defendant that in the case of *Tan Yeong Kim v Tenaga Nasional Berhad*, Alauddin J (as he then was) has enumerated in detail the proper reading of s 38 in which at p 8 (MLJU); p 634 (CLJ) of his judgment he said the following :

> Pada penghakiman saya seksyen 38(1) ini tidak memerlukan satu pembuktian kesalahan oleh mahkamah sebagai pra-syarat sebelum kuasa pemotongan dapat dilaksanakan oleh TNB sebagai pemegang Lesen.
>
> Saya juga diingatkan bahawa TNB sebagai badan yang dipertanggungjawabkan untuk membekal tenaga elektrik ke seluruh negara seharusnya diberikuasa menjalankan tanggungjawabnya sejajar dengan peruntukan undang-undangnya iaitu Akta Bekalan Elektrik 1990 khasnya.
>
> *Kini plaintif tidak boleh mempersoalkan kuasa yang diberikan kepada defendan berhubung pemotongan bekalan* dan seterusnya kuasa defendan menuntut bayaran-bayaran yang dikenakan terhadap plaintif apabila defendan membuat kiraan semula jumlah penggunaan elektrik yang sebenarnya ... (Emphasis added.)

[57] It was also the submission of the counsel for the defendant that in *Claybricks*'s case, the Court of Appeal had clearly explained the specific operation of s 38 of the Act wherein at para 8 of p 223 of the Court of Appeal's judgment, it was held as follows:

> Kami perlu menyatakan di sini bahawa peruntukan s 38(1) Akta tersebut adalah jelas dan terang di mana proses mahkamah tidak diperlukan untuk menentukan sama ada sesuatu kesalahan telah dilakukan sebelum tindakan di bawah seksyen tersebut boleh diambil. Sekiranya proses pembuktian kesalahan melalui mahkamah diperlukan ianya akan mengambil masa yang lama sebelum kuasa di bawah s 38(1) dapat digunakan. Kami berpendapat s 38(1) Akta tersebut telah diperuntukkan secara spesifik untuk menjaga kepentingan TNB dan membolehkan TNB bertindak cepat dan dengan itu dapat mencegah penyalahgunaan seperti pencurian bekalan elektrik yang dibekalkan oleh TNB. Jika badan perundangan berniat bahawa pembuktian kesalahan melalui mahkamah diperlukan sebelum kuasa di bawah s 38(1) Akta tersebut dapat digunakan, maka peruntukan yang jelas harus dibuat mengenainya. Bagaimanapun, tiada peruntukan seperti itu dibuat. Adalah pandangan kami, tafsiran yang cuba diketengahkan oleh peguam perayu tidak dapat diterima kerana jika mahkamah ini berbuat demikian dengan memasukkan

perkataannya sendiri untuk dipakai ke dalam Akta, ianya adalah bertentangan sama sekali dengan segala prinsip pentafsiran statut.

[58] What the plaintiff is seeking before this court is an order to compel the defendant to reinstate the supply of electricity to the plaintiffs' prawn ponds.

[59] In *Janab's Key to Civil Procedure*, (5th Ed) at p 348, the author explained the definition of mandatory injunction as orders of court which command the respondents to do some positive act and particular thing. The author had referred to Megarry J's observation on the differences between prohibitory and mandatory injunction in the case of *Westminster Brymbo Coal and Coke Co v Clayton* (1867) 36 LJ Ch 476:

> There are important differences between prohibitory and mandatory injunction. By granting prohibitory injunction the court does no more than prevent for the future the continuance or repetition of the conduct of which the plaintiff complains. The injunction does not attempt to deal with what has happened in the past; that is left for the trial, to be dealt with by damages or otherwise ...
>
> On the other hand, a mandatory injunction tends at least in part to look to the past, in that it is often a means of undoing what has already been done, so far as that is possible. Furthermore, whereas prohibitory injunction merely requires abstention from acting. A mandatory injunction requires the taking of positive steps, and may require the dismantling or destruction of something already erected or constructed. This will result in consequent wasted time, money and materials if it is established that the defendant was entitled to retain the erection.

[60] Clearly, I must say, an order compelling the defendant to re-connect the supply of electricity, means directing the defendant to do this positive act. This positive act is mandatory in nature.

[61] The principles governing the exercise of courts discretionary power in the granting of an interlocutory mandatory injunction are well established. An interlocutory mandatory injunction would only be granted by the court save in an exceptional and extremely rare case, in that there are special circumstances. The case must also be unusually strong and clear in that the court must feel assured that a similar injunction would probably be granted at the trial on the ground that it would be just and equitable that the plaintiff's interest be protected by immediate issue of an injunction, otherwise irreparable injury and inconvenience would result (see (i) *Redland Bricks Ltd v Morris* [1970] AC 652, (ii) *Wah Loong (Jelapang) Tin Mine Sdn Bhd v Chia Ngen Yiok* [1975] 2 MLJ 109, (iii) *Sivaperuman v Heah Seok Yeong Realty Sdn Bhd* [1979] 1 MLJ 150, (iv) *Tinta Press Sdn Bhd v Bank Islam Malaysia Bhd* [1987] 2 MLJ 192, (v) *Gibb & Co v Malaysia Building Society Bhd* [1982] 1 MLJ 271 at p 273, (vi) *Shepherd Homes Ltd v Sandham* [1971] Ch 340 at p 349 and (vii) *Jakob Renner (an infant suing through his father and next friend, Gilbert Renner) & Ors v Scott*

King, Chairman of Board of Directors of the International School of Kuala Lumpur & Ors [2000] 5 MLJ 254).

[62] This court to refer to *Shamsudin*'s case which was cited by the defendant's counsel. In this case Abdul Malik bin Ishak J (as he then was) apart from His Lordship's firm stand on the non-application of *American Cyanamid* principles in mandatory injunction application, he had further listed in clear words the three conditions to be fulfilled before an interlocutory mandatory order can be granted. The three conditions are:

(1) The application must prove by affidavit evidence that his application is an exceptional and extremely rare case which merits the order prayed for.

(2) The application must show that his case is clear and one which the Court thinks ought to be decided at once in his favour.

(3) The application must show a clear case for relief or a high degree of assurance that that injunction, if granted, would rightly be granted.

[63] In light of the above mentioned authorities, it is thus clear that the legal burden is on the plaintiff to satisfy this court that the plaintiff's case is exceptional in nature and is extremely rare. The plaintiff also needs to show that its case is an unusually strong and clear case together with the existence of special circumstances in order to be entitled to such injunctive relief.

[64] Does the plaintiff's case falls within the category of exceptional and extremely rare cases? Or is the plaintiff's case unusually strong case and were there any special circumstances in this case for this court to exercise its discretion?

[65] Now, with regards to s 38 provision, the Federal Court in the case of *WRP Asia Pacific* has read provision in the following words:

> Section 38 of the Act empowers the respondent to discontinue electricity supply based on the subjective finding of its employee if any offence has been found committed under ss 37(1), 37(3) or 37(14) of the Act. The respondent had clearly complied with all the necessary statutory requirements where it had served the appellant not only with the letter but also the two documents, which were necessary pre-requisites under the Act. In the event if the respondent was later found to have breached its obligation under the contract or its statutory obligation, the appellant may file an action against the respondent. Hence, the appellant was not without a remedy.

[66] The Court of Appeal in *Claybricks*'s case in preferring Alauddin J's interpretation of s 38 in the case of *Tan Yeong Kim* had this to say:

> ... Dalam hal perkara ini, kami lebih cenderung untuk menerima dan bersetuju

dengan tafsiran dan pandangan yang dibuat dalam kes *Tan Yeong Kim v Tenaga Nasional Bhd* [2000] 8 CLJ 629; [2000] MLJU 447 di mana YA Hakim Alauddin (YA pada masa itu) telah menyatakan antara lain bahawa s 38(1) Akta tersebut tidak memerlukan satu pembuktian kesalahan oleh mahkamah sebagai pra-syarat sebelum kuasa pemotongan dapat dilaksanakan oleh TNB sebagai pemegang lessen. Seterusnya YA Hakim menyatakan ianya digubal sebegitu rupa untuk memberi kuasa efektif kepada TNB memberhentikan dengan segera sebarang kesalahan yang berlaku dan tidak dibiarkan berlarutan.

[67] In this regard, I am in agreement with the contention of the counsel for the defendant that the legal position or operation of s 38 had been well settled by both the Appellate Courts ie by the Federal Court in the case of *WRP Asia Pacific* and the Court of Appeal in the *Claybricks*'s case.

[68] It is the court's view that both the cases had in clear language construed the operation of s 38 provision. The Federal Court in the *WRP Asia Pacific* clearly held that for the invocation of s 38 by the defendant, it merely requires a subjective finding by the defendant's employee that an offence under s 37 has been committed. The statement of law from this decision, as this court understands it is, as long as the defendant's employee found in any premises there appear any evidences an of offence committed under ss 37(1), 37(3) or 37(14) and the documentation requirements envisaged in the Act has been fulfilled by the defendant, the defendant has every right to exercise the power conferred to it under s 38 to disconnect the supply of electricity. There is no issue of pre-conditions to be fulfilled by the defendant such as proof of the commission of offences or providing reasons for disconnecting the supply of electricity. Whilst the Court of Appeal in *Claybricks*'s case in its preference to accept the interpretation of section 38 in its literal and ordinary meaning by Alauddin J (as he then was), the Court of Appeal had also emphasised the correct statement of law; that s 38 is specifically provided in the interest of the TNB to enable TNB to act quickly in preventing any abuse of electricity such as stealing.

[69] In this regard, with respect, it is this court's considered view that the plaintiff's counsel's contention as well as his reading of the Court of Appeal's judgment in *Claybricks*'s case is somewhat misconceived.

[70] Firstly, accepting the plaintiff's counsel's arguments would be going against the authorities of two higher courts, one being the highest court in the land in which this court has no intention to depart from. Secondly, this court finds that the Court of Appeal in *Claybricks*'s case did not set out any conditions for the defendant to fulfil before invoking s 38. What the Court of Appeal actually said was this, 'seksyen 38 adalah secara spesifik diperuntukan menjaga kepentingan TNB bagi membolehkan TNB bertindak cepat dan mencegah penyalahgunaan seperti kecurian'. Nowhere at all was it mentioned

in the judgment of the two conditions submitted by the counsel for the plaintiff.

[71] Alluding the facts of this present case and relying on the abovementioned authorities, it is this court's judgment that the defendant's act in disconnecting the supply of electricity to the plaintiff's premises cannot be said to be an act of mala fide and neither was it an abuse of the process of law. The defendant's act is a legitimate act within the parameters of s 38 of the Act. Hence, it is the judgment of this court that the plaintiff's case is not exceptional or extremely rare in nature. There are also no special circumstances for this court to exercise its discretionary powers to grant an interlocutory mandatory injunction to the plaintiff.

[72] In any event, the court is wrong on this approach, I will move on to consider the '3 stage test' submitted by the counsel for the plaintiff.

[73] In light of the earlier findings by this court, the two issues raised by the plaintiff do not render or constitute bona fide serious issues to be tried.

[74] Be that as it may, this court opines that the plaintiff's assertion in respect of access as well as the meter condition, have been addressed by defendant in the affidavit in reply defendant (3). It was stated in para 12 of the affidavit that the defendant had found there was another entrance from the plaintiff's premises to which the key or padlock does not belong to the defendant. As regards to the meter, it was stated in the same para that the four days lapsed from 19 February 2013–23 February 2014 had given the plaintiff the opportunity to normalise the CT and restore the CT to its original position. This also answered the claim by the plaintiff on why the defendant took two months to disconnect the supply of electricity. The issue of abuse of electricity does not arise after the meter of the CT had been normalised.

BALANCE OF CONVENIENCE

[75] It is this court's judgment that the balance of convenience in this present case lies in favour of the defendant. Section 38 of the Act was enacted by the Parliament specifically to assist the defendant to operate in an effective and efficient manner to prevent abuse of electricity. To accede to the plaintiff's request for an interlocutory mandatory injunctive relief when the defendant had acted within the parameters of its power, will not only result in the hindering the efficacy of the defendant's administration and operation in curbing or preventing the abuse of electricity such as stealing, it also defeats the intention of the Parliament in enacting such provision, in which this court is

not prepared to do. This court is of the view that, to do so would create a grave and substantial injustice to the defendant and the damage suffered would be irreparable.

[76] It is for the plaintiff to prove that damages would not be an adequate compensation if the interlocutory mandatory injunction is not granted. However, this court finds that even in case the plaintiff was wrongly denied of his supply of electricity, the plaintiff's losses from his prawn rearing business is indeed pecuniary and calculable in monetary terms. Thus, damages are an adequate remedy which the defendant is in the position to pay. In fact if there were any losses which could not be adequately compensated with damages, it is actually against the defendant as they had been deprived of their powers conferred by the Parliament, if the interlocutory injunction is allowed.

[77] There is one pertinent issue which requires this court's consideration. Section 38 has a proviso which provides that the period of disconnection shall not exceed three months. This proviso is also another reason why this court should not grant the injunctive relief to the plaintiff. The disconnection will lapse after three months, thus if the interlocutory mandatory injunction is granted, the plaintiff would have a benefit of having a continuing injunctive relief even after the three months period had lapsed until the disposal of the case.

[78] There was another point raised by the counsel for the plaintiff with regards to the compliance of the *Panduan* C 1/2006 — *Panduan Perkhidmatan Pengguna dan Pemasangan, Panduan dan Prosedur Pengekangan Kecurian Tenaga Elektrik* issued by the defendant. A simple answer to it. This is purely an administrative guideline issued by the defendant to its employees setting out standard procedures and actions to be carried out in handling electricity stealing cases to ensure a speedy and effective settlement of such cases. This guideline is not legally binding and non-compliance of this guideline will only result to administrative actions against employees.

[79] Based on the reasons above stated, the plaintiff's application is hereby dismissed with costs of RM5,000.

Application dismissed with costs of RM5,000.

Reported by Afiq Mohamad Noor